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FILED ECF

Honorable Kenneth M. Karas
United States District Judge
United States District Court
500 Pearl Street
New York, New York 10007

RE: United States of America v.
Nathaniel Shyne
S4 05-CR-1067-04 (KMK)

Dear Judge Karas:

I write with regard to the difficult and complex task of sentencing of Nathaniel Shyne scheduled for September 25, 2007 at 11:00 a.m. The task is made even more complex and difficult by the recommendation of the Probation Department based principally on his criminal history. Probation in its assessment, and the Guidelines calculation in its assessment, makes no allowance for the fact that with the exception of the instant offense, every other piece of criminal behavior by Mr. Shyne was tied directly to and a cause of his harrowing and unresolved drug addiction. That addiction, estranged him from family and friends, was "kicked" by his own diligent work and effort. As described in more detail below, Nathaniel Shyne having conquered his addiction and having found meaningful work, was led into the instant offense by his desire to reestablish himself with his family. It appeared that his brother, the family golden boy, after long absence and rejection because of Nathaniel's drug dependency, came to Nathaniel to ask him for a favor. The brother, however, came back to Nathaniel, not in fraternity as Nathaniel believed, but seeking a dupe for criminal behavior.

THE CRIME

Nathaniel Shyne pleaded guilty to on count each of conspiracy to commit bank fraud under 18 U.S.C. § 1349 and conspiracy to launder funds, under 18 U.S.C. § 1956(h). He has been incarcerated for two years since his arrest on these charges on August 30, 2005. Count I charged a wide ranging conspiracy over three years in which the principal actor was Nathaniel Shyne's brother Douglas and others of Douglas' immediate and extended family, none of whom had prior convictions to this defendant. Count 14 charges that this defendant and his brother, along with others from June to August of 2005, committed bank fraud knowing that the transactions, the moving of money from checks to accounts and then withdrawing a portion of the money, was designed to conceal and disguise the original proceeds' source and truthful ownership. Nathaniel in each of the events in this case in which he played a role either used his own personal bank account or permitted another person to use it. Nathaniel made no attempt to conceal his involvement. He did not use a false identity or act in any way to conceal his own actions and deeds.

Mr. Shyne seeks a horizontal departure as to his Criminal History Category so as to obtain a sentence of 33 months.

THE DEFENDANT

Nathaniel Shyne has had a wretched life, much of his own making and his own weakness. He had the opportunity to take his life back from the ravages of addiction and petty theft. He did it. He had the opportunity to return to his family and achieve what eluded him - acceptance. He sought approval and acceptance and never received it. He believed that he was not the Golden Boy that his brother was. So when the Golden Boy deigned to return to Nathaniel and shine his light on him, old habits die hard. The desire for lost and sought after approval presented itself. Nathaniel could be loved and approved by

Douglas, the last of the Shyne brothers and the blessed brother. And like most who seek love where it is not, he made a mistake. He allowed his own bank accounts to be used. He exposed himself in his own name to whatever would happen. He relied first on Douglas' assurances and then disquieted by what was going on, relied on the idea that love from his brother was more valuable than his own self. The weaknesses that led to alcohol and drugs, now posed as the devil's last deceit, family loyalty, to allow Nathaniel to disguise what he had to know was criminal behavior by the brother who in the family myth could do no wrong. Once again Nathaniel Shyne has learned the hard way. Now he faces the Court, with nothing left but his sordid past of drugs and theft which he has struggled and grown to put behind him and with no support from a place that should have and should be giving it, his family. Sometimes it is not that the defendant is unlovable, it is that there is no one there to love him. In Nathaniel's case, only the people of Project Renewal and a cousin have sought to know how he is and what he needs.

Nathaniel Shyne fell into heroin addiction. He drifted from "fix" to "fix". He supported his habit by petty theft, shoplifting from stores. It was not who he really wanted to be, but it was who he had become.

Drug addiction has its own rules and recovery requires a certain intensity and commitment.

Finally, Nathaniel Shyne found his way to Project Renewal, where he could recover from his addiction. After a long struggle with himself, he was successful. Once he recovered the Project wanted to support Mr. Shyne. So it went from helping him to employing him. He was hired as a maintenance man for them at minimal wages. With a job, he made a permanent home for himself renting a room, paying rent and rejoining society. His recovered self longed to reconnect with his birth family so when his brother sought him out he was pleased to renew contact with his brother because Nathaniel

Shyne was proud of what he had finally accomplished, a drug free life.

The rehabilitation of a drug addict by his act of will is no mean accomplishment. Because of it, society has regained a productive citizen. It appears society has nothing to fear from him, as it seems most unlikely he will now throw away his rehabilitation and return to drugs. United States v. Rodriguez, 724 F.Supp. 1118 (S.D.N.Y. 1989).

THE PLEA OF GUILTY

Nathaniel Shyne pleaded guilty to Counts 1 and 14 pursuant to an agreement, the terms of which are fully described in the PSR. The principal difference in this plea agreement from so many others is that both sides have agreed to present to the Court the issue of whether or not pursuant to U.S.S.G. § 4A1.3 (b), the criminal history score of VI substantially overstates Mr. Shyne's criminal record and criminal behavior. The Government and the defense agreed that the defendant would be able to seek a downward departure from the stipulated range on the basis that stipulated criminal history category overstates the nature and the quality of his criminal past and that a fairer representation, according to the defense would be a Category IV

Pursuant to the agreement, the defendant's offense level was agreed to be an offense level of 16.

As part of the plea agreement the defendant agreed that the calculated Criminal History score was 23 leading to a Criminal History Category of VI.

The range under the Guidelines would be 46-57 months.

Were the Court to grant the downward departure to a Criminal History Score of IV then the result would be a range of 33 to 41 months.

OBJECTIONS TO THE PSR

The defendant objects to certain of the statements in the PSR, as well as the recommended sentence. The defendant also vigorously objects to the sentencing recommendation as heartless and unnecessary punitive so as to be a sentence greater than necessary and a product of the overstated criminal history category assessment.

The defendant objects to Paragraph 13 insofar that it relies upon a referenced but not shown "computer inquiry" of BOP records indicating no verification of the alleged information. Further, there is no means to ascertain whether and what a sanction for non-criminal phone abuse is and was. There is no indication if there was a hearing or due process on this allegation. Because it could prejudice the defendant in his security assignment in the BOP, the defense moves for the last sentence of Paragraph 13 to be stricken.

The defendant has no knowledge with regard to the material contained in the paragraphs that do not mention him with the exception of the familial relationship he has with Douglas Shyne and Douglas' common-law-wife.

Paragraph 99 and 100 recite that Natasha Singh deposited $180,000 in a single counterfeit check in Nathaniel Shyne's account. Of the $180,000, two checks were issued, according to the PSR the next day by Shyne himself in the total amount of $135,000, which she put in her account leaving Shyne with $35,000.

Paragraph 125 indicates that "approximately" six checks were deposited in Nathaniel Shyne's back account. They were issued to him and totaled the amount of $21,850.

Each of the acts of Nathaniel Shyne involved depositing of the questionable checks into his own personal bank

account in Bank of Commerce. He made no effort to hide the checks or the deposits, although it is clear that he had no reason to obtain these amounts of money.

In fact, the bank shut down Shyne's account because of the unusual activity given the amounts were out of phase with anything Mr. Shyne ever had or put into the bank.

Although Mr. Shyne retained little or none of the proceeds of the fraud, Probation charges that he should be held to a restitution amount of $201,850 despite the fact of that money, $135,000 went in and out of his account to Natasha Singh. Therefore, we object to the victim impact as delineated in Paragraph 127 since it overstates the victim impact. Put simply, the same amount of money can only be stolen once in the fraud by Mr. Shyne.

The defendant objects to the allegation in the PSR Paragraph 175 that claims that the defendant injured three guards during an attempted shoplifting when, in fact, he was not prosecuted for it, the final disposition only revealed petit larceny and the term injured is merely prejudicial and not informative since no assault charges were instituted or docketed as Mr. Shyne. Along with the prejudice of listing arrests, the un-pursued allegations are not even reliable for usage during sentencing.

NATHANIEL SHYNE'S CRIMINAL HISTORY

Counsel does not and cannot challenge the computation under the Guidelines. No minor mathematical error would alter the results. In what can fairly be characterized as an amazing set of pages, Mr. Shyne, while under the influence of and while addicted to narcotics, managed to get himself arrested and convicted of misdemeanor offenses on a regular basis. The government and defense counsel totaled up the criminal history and obtained and agreed to a calculation of the defendant's criminal history points indicating a Category VI, based upon a

total number of points of 23. Probation totaled the number of points as 30. In either case, under any interpretations of the Guidelines or any mathematical computation of relevance, the defendant ended up in Category VI.

The PSR lumps initially and at the close arrests of the defendant with the later convictions. It also, at some juncture, recites uncritically the fact that the arrest report reports (but does not charge) higher degrees of criminality than those that were actually charged against the defendant. Where the arrest report contains an allegation of criminality, it is unsworn and unvetted by anyone but the officer copying what he is told. It should not be used in a PSR. In the case of the charging instrument, that piece of paper is in fact sworn to under oath and usually is hearsay, based upon an officer's taking of a statement from a person claiming to be a victim. That document must be corroborated by an affidavit. Where it is not, the charges are dropped. Where the instrument is corroborated, then the matter is an actual criminal complaint fully judiciable in the courts of the State of New York. Felony complaints must produce indictments or agreements to plead by a Supreme Court information. The PSR lumps all the arrests, the complaints corroborated or not, and other activity together. While this does not impact on the number of criminal history points the defendant has incurred, it informs the veracity and reliability of the unverified nature of some of the statements in the PSR.

Probation reports that for the ten years between 1982 and 1992 the defendant amassed 45 prior arrests. Not every arrest resulted in a conviction. The PSR states without being concise that these prior arrests result in numerous convictions leaving the implication that many of them did not result in convictions.

The crimes of conviction include the classic drug offender larceny and criminality tied to the need to obtain the items of addiction without resort to violence. They include

Petit Larceny, Theft of Services, Criminal Trespass, Disorderly Conduct Jostling, Criminal Possession in the lowest degree of drugs, Shoplifting, Sale of Methadone and the like.

While the PSR is studiously silent on interpreting the cycle of crime, despite the eliciting of the requisite information, and in its recommendation seems to punish the recovered addict as if he still is an addict. The defendant's criminal history reveals a life that from the age of 25 to 35 at least, the defendant was mired in a cycle of addiction and misbehavior on the minor end of criminal activity. The PSR is silent on the disposition of these offenses but as demonstrated by much of the rest of Mr. Shyne's record, no services, no rehabilitation and no attempt to move him from the cycle of addiction and crime to any other positive action occurred in the NYC Criminal Justice System.

The PSR only reports dispositions of course as a means to total up criminal history points in the Guidelines assessment. Therefore, it demonstrates that the convictions for petit larceny and possession of stolen property get sentences of a few months in custody, all arise out of shoplifting in department stores. See Paragraphs 146, 148, ($392 in merchandise), 150 (25 bottles of perfume), 152, 154, 156, 158, 160, 162 ($104), 173, 175.[1]

His prior felony was in 1997 when he pleaded to attempted burglary in the third degree for removing property from a store without paying for it at four o'clock in the afternoon. He did a year, was paroled, which was revoked for taking property without paying for it twice (Paragraph 167 and

[1] This arrest described at Paragraph 174 states that the defendant "injured three guards in the process". The disposition is confined to petit larceny. This casts grave doubt on the allegation of injured guards especially since there was no prosecution for the injury to anyone.

169 ($115)). He received no treatment for addiction in the New York State prison system.

As part of the anti-shoplifting initiative, the stores in conjunction with certain courts began to serve defendants in such cases with notices regarding the fact that their reappearance would be trespass, in effect banning them from the otherwise public commercial establishment. This apparently is what is referenced in the PSR Paragraph 170 and 171. The PSR improperly listed the arrest report charges which were not even the ones brought against the defendant in court (See Paragraph 171). The defendant requests that the sentence reading, "The charges as listed on the arrest report. . ." be stricken.

OBJECTIONS TO THE USE OF PRIOR ARRESTS

As discussed above and as demonstrated by Paragraphs 179-182, pursuant to United States v. Miller, 263 F.3d 1 (2d Cir. 2001), Mr. Shyne specifically objects to any use of his prior arrests as delineated either clearly or in a muddled fashion as regards any determination as to a downward departure on the basis of U.S.S.G. § 4A1.3. The use of a prior arrest record, in whole or in part as a basis for refusing to depart downward, may be error, but only if the defendant objects to it in the District Court. The defendant in this case specifically objects and insists that even after Miller, it is error for a sentencing court to deny a downward departure on application under U.S.S.G. § 4A1.3. The Policy Statement discussing the departure upward or downward indicates that in accepting the departure, any prior arrest record itself shall not be considered in terms of U.S.S.G. § 4A1.3. While Miller refuses to hold that the use of the record is plain error, it offers a surprisingly weak argument that the arrest record prohibition is only in the context of upward departures. The Court's reasoning in Miller is exactly the type of exegesis frowned on when done on behalf of a defendant.

THE PSR OVERLOOKED THE MOST SALIENT ASPECT OF THE CRIMINAL HISTORY AND THUS TAINTED THE RECOMMENDATION

Nathaniel Shyne's last involvement with the criminal justice system before this case was July of 2003.[2] He was sentenced to nine months of custody and was released on September 10, 2002.

After this incarceration, again for drug related shoplifting and theft, Nathaniel Shyne at 46 was motivated, driven and shamed into facing the issue of addiction and trying to seek a road to recovery. The defendant had been severely addicted to drugs and to alcohol. His life led him to minor and petty thefts from stores as a shoplifter. He had and never had or used a weapon. He did not engage in violent behavior. He stole or tried to steal relatively small amounts of property. Sometimes he was charged with petit larceny and once he was convicted of burglary for theft in broad daylight from a store but all the acts were shoplifting. It was this life that was the totality of his life of crime. He recovered from his addiction. He rehabilitated himself to the point where he was clean of drugs and alcohol, maintained a job, participated in ongoing recovery work and renewed family relationships. Nathaniel Shyne until Douglas Shyne asked him for his help in the instant criminal scheme, had foresworn the drugs and alcohol and the things that drove him to the crimes that he committed.

While the PSR does relate Mr. Shyne's life story in brief, it accepts at face value his understanding of his growing up and events in the home, without making a stab at analyzing the impact of such things in the house on the children that live in that environment. Knowing no other childhood, it is not surprising that the defendant characterizes it as "pretty decent".

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[2] He received 2 extra criminal history points because he committed the instant offense within two years of his custody terminating on the last offense (PSR Paragraph 177).

APPLICATION FOR DEPARTURES

Even in the post-Booker world, the defendant may seek departures in order to ameliorate the impact of 18 U.S.C. § 3553 (a) (4), which requires consideration of what would have been the mandatory Guideline sentence. While there is no presumption of regularity mandated in the Guidelines computation, Rita v. United States, ___ U.S. ___ ; ___ S.Ct. ___, 2007 WL 1772146, this Circuit has played tug of war with the meaning of non-mandatory nature of the Guidelines. See United States v. Rattoballi, 452 F.3d 127, (2d Cir. 2006) suggesting that the consideration of departures remains as significant as the computation of the adjusted base offense level and computation of the criminal history category.

Departure downward from the applicable Guideline range is permitted if the court finds that there exists an aggravating or mitigating circumstance of a kind or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines, so that it results in a sentence different from that described by the process. United States v. Koon, 518 U.S. 81, 92 (1996).

Under 18 U.S.C. § 3553(b), the sentencing court is authorized by Congress to depart from an applicable sentencing range in cases where there exists an aggravating or mitigating circumstance of a kind or to a degree not adequately taken into consideration by the Sentencing Commission in the formulating of the guidelines, so as to result in sentence different from that described. The Commission itself acknowledged by the promulgation of U.S.S.G. § 4A1.3 (b) that courts should consider departing from the guidelines where “reliable information indicates that the criminal history category substantially over represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes.” The Commentary to § 4A1.3 offers an example of when a downward departure may be warranted: “[I]f for example, the defendant had two minor misdemeanor convictions close to ten years prior to

the instant offense and no other evidence of prior criminal behavior in the intervening period." U.S.S.G. § 4A1.3 n. 3.

Nathaniel Shyne moves for a downward departure on the basis that the criminal history category "substantially over represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes U.S.S.G. § 4A1.3 (b)(1). Courts in this Circuit have departed downward under the authority of U.S.S.G. § 4A1.3 where the criminal history generates a category greater than the sum of its parts. Where petty criminality is associated with the addict's attempt to get money to buy drugs, there has been a departure. United States v. Hammond, 37 F.Supp. 204, 205 (E.D.N.Y. 1999). Where the sentences have been just long enough to trigger accumulation of criminal history points then there has been a departure. See e.g. United States v. DeJesus, 75 F.Supp.2d 141, 143-44 (S.D.N.Y. 1999).

Fundamentally, Nathaniel Shyne's criminal history and likelihood of recidivating, differ significantly from the typical offender for whom the Sentencing Commission formulated the Criminal History Category of VI, which does not adequately reflect the seriousness of the defendant's past-criminal conduct. Thus, the Commission set out the parameters of the existence of a place outside the heartland. The district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing. The departure sought in this case from Criminal History Category VI to IV is often referred to as a horizontal departure from the fact that it slides along the horizontal axis of the Guidelines grid.

HORIZONTAL DEPARTURE

The issue for Mr. Shyne is one where justice must act to distinguish between the vicious and the unfortunate. The assessment under U.S.S.G. § 4A1.3 (b) is tied to two independent but integrated assessments. The first is whether the criminal

history over represents the defendant's criminal acts and behavior. The second is whether it over estimates the likelihood of the defendant committing crime again. Either of the two or both justify in the case of Mr. Shyne a horizontal departure.

The criminal behavior of Mr. Shyne overstates his history so as to expose him to punishment as is demonstrated by the PSR calculation and assessment, far in excess to what is necessary thus violating the parsimony clause. The Circuit Court has stated that this type of departure is most frequently used when a series of minor offenses often committed many years before the offense results in a criminal history category that overstates the seriousness of the defendant's record. United States v. Carrasco, 313 F.3d 750, 767 (2d Cir. 2002).

In assessing this defendant's life, the district courts assess a variety of issues. The case closest to that of Mr. Shyne's is United States v. Eisinger, 321 F.Supp.2d 997 (E.D. Wis. 2004). There, the defendant had a criminal history that was elevated by the fact that there were multiple convictions for shoplifting, and drug possession. The court held that the criminal history category significantly overrepresented the defendant's criminal record because this defendant's rap sheet was "not the sheet of the usual occupant of [the category]". The court determined that the defendant's criminality did not reveal a propensity for dangerousness or a willingness to hurt others, but rather was the result of a time when the defendant was a drug addict. In a similar vein, an assessment that the criminal behavior involves relatively minor offenses, that none involved actual violence ad were the fruit of substance abuse that has now been ceased. See United States v. Hammond, 240 F.Supp.2d 872 (E.D. Wis. 2003); United States v. Hernandez, 2005 WL 1423276 (S.D.N.Y. 2005). The criminal behavior in the past and the present matter should not be condoned or minimized. The criminal record of Mr. Shyne is not as serious as the crimes that put many of the other defendants in Category VI. See e.g. United States v. Anderson, 955 F.Supp.

935 (N.D. Ill 1997). Additionally, where the defendant was basically a decent person whose entire criminal past was tied to becoming involved in drug use, involved what appeared to be impulsive substance related behavior, the criminal history category, in reliance on the repeated albeit minor convictions, boost a minor criminal record into the highest category by sheer numerosity rather than criminality. It produces a draconian sentence that disserves the interest of justice and society because the defendant is drug free, contrite for his criminal behavior, and a good prospect for reform and rehabilitation. See e.g. United States v. Hughes, 825 F.Supp. 866 (D Minn. 1993).

The facts of the defendant's cases, i.e., the amounts shoplifted or attempted to be taken, the fact of his drug addiction and his recovery as demonstrated by the fact that his post-arrest testing confirmed his liberation from drug use, all provide reliable information that Category VI overstates the defendant's actual criminality. The Criminal History Category of VI failed to make a distinction so necessary for sentencing between severity of criminal acts and the dangers posed by particular criminals who earned the Category VI designation. See United States v. Carvajal, 2005 WL 476125 (S.D.N.Y. 2005). The Court may conclude that the defendant's criminal history was significantly less serious than those of most defendants in the same criminal history category and therefore, it considers a downward departure from the Guidelines. U.S. Guidelines Manual § 4A1.2. The Guidelines, by their terms in this particular area and with the advent of United States v. Booker, 543 U.S. 220 (2005), make it clear that they are not be applied in a mechanistic fashion, wholly ignoring fairness, logic and the underlying statutory scheme which provides for specific departure as a relief from the numerical scores.

The next issue is whether this defendant truly is appropriate for a Category VI. The courts look to whether the crimes of conviction are those of violence to determine if the defendant is someone with a succession of violent crimes and

multiple lengthy sentences so as to justify placement in highest category as Mr. Shyne has been placed. See e.g. United States v. Wilkerson, 183 F.Supp.2d 373 (D Mass. 2002). Despite the fact that the violent or non-violent issue is a far greater predictor of recidivism and means for evaluating culpability, it is not reflected in the criminal history score. Mr. Shyne has no actual charging documents that indicate any violence. The sole arrest that contains a claim of harming three security guards was on the arrest report, but not charged in any respect. To that extent, the fact that it was a claim at the time of the arrest, but not pursued by the authorities who decided whether or not it was a provable allegation, makes it less than reliable information and should not be used to assess that Mr. Shyne engaged in violent conduct. Thus, a defendant with multiple violent crimes and multiple incremental sentences would be the person for whom this level of incarceration would be reasonable, defies the same application to this defendant. Unless each person is no more than a point on a grid, then this defendant's criminal history score overstates his criminal past.

The criminal history score mirrors disparities in the state system and magnifies criminal behavior without regard to the state assessment of such activities.

The second basis for departure is that the U.S.S.G. calculation significantly over represents the seriousness of the defendant's criminal history. Under the Guidelines, criminal history does not attempt to gauge the seriousness of the crime of conviction; rather it "'estimates the likelihood of recidivism.'" United States v. Morris, 350 F.3d 32, 37 (2d Cir. 2003) (quoting United States v. Campbell, 967 F.2d 20, 24-25 (2d Cir. 1992)); see generally U.S.S.G., Ch. 4, Pt. A, Intro. Comm. (discussing relevance of prior criminal history to factors set forth in 18 U.S.C. § 3553(a)(2)). The U.S. Sentencing Commission issued a Policy Statement regarding the adequacy of determining a defendant's criminal history category, stating that there may be cases where the Court concludes that a defendant's criminal history category significantly over

represents the likelihood that the defendant will commit further crimes, i.e., recidivate. The facts and circumstances of the instant criminal behavior indicate that the defendant is highly unlikely to recidivate. Remorseful and in despair of the loss of all that he had fought so hard to gain, Nathaniel Shyne will not engage in criminal behavior. The loss of trust in close family members is painful but not as much as being back in jail. He has fought his way out of a life of addiction and squalor. The ability to do something to re-earn his brother's love and affection was itself a one time life event. Having overcome his physical weaknesses, he has not overcome his emotional weaknesses by facing what his brother did to him, Nathaniel Shyne takes full responsibility for what has done. With full awareness and complete contrition, he is less likely to commit another crime than many others. He knows too well what he has had and lost.

U.S.S.G. § 4A1.3 affords the sentencing court discretion to depart downward in this type of case. This Circuit has required that the sentencing court set out its specific reasoning. United States v. Butler, 954 F.2d 114, 121 (2d Cir. 1992). The Commission has suggested departures in situations where minor criminal cases generate greater than necessary sentences. This Circuit has required that such departures based upon over statement of criminal history procedurally be accomplished by the court proceeding sequentially from the defendant's criminal history category to the next, pausing at each step to consider whether that category in particular, adequately reflects the seriousness of the defendant's record. United States v. Khalil, 214 F.3d 111, 123 (2d Cir. 2000).

WHO IS HE REALLY?

Nathaniel Shyne is a man who has tossed away most of his life and only before the arrest in this case regained it only to have it slip away. When it first eluded him, he descended into a life of drug addiction and petty theft. His

final achievement was to clean himself up, go from patient at Project Renewal and then to be employed there. He had begun to put the pieces together.

Robert Doyle paints a picture of life before the drug addiction and Nathaniel Shyne's life after. Through the church and other areas, Mr. Doyle found that Mr. Shyne was willing to go back to the old neighborhood to try to convey an image of life without violence and drugs. It seems Mr. Doyle's redemption embraces his forgiveness and affection for Mr. Shyne. (Exhibit A).

Brian Thorman also wrote for Mr. Shyne. He was involved in trying to help Mr. Shyne when he was first arrested and has been in constant conduct with the office asking about and trying to look after Mr. Shyne's welfare. It is Mr. Thorman who cues the Court to the fact that "only recently" have they begun to tighten their family bonds. Mr. Thorman also allows the Court a look at Mr. Shyne when not in the throes of or subject to the life of addiction. He states that Mr. Shyne went to the Thorman boy's football games, advised him as a young man, to make intelligent and just decisions, to have morals and dignity (Exhibit B). For Nathaniel Shyne it was a demonstration of what he wanted he himself to be and could not achieve it. Inculcating it in his nephew may have been the closest that Nathaniel Shyne could rescue someone, if not himself. According to Mr. Thorman, Nathaniel Shyne was successful with his young cousin, when he could not do it for himself.

NATHANIEL SHYNE DESERVES THE SOUGHT AFTER DEPARTURE

The Supreme Court wrote in Koon the basis of sentencing under the Guidelines is fundamentally the same assessment delegated to the judiciary from the very first moment man moved from mob justice inside into rooms with the signs and symbols of rationality:

> This too must be remembered, however. It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. We do not understand it to have been the Congressional purpose to withdraw all sentencing discretion from the United States District Judge. Discretion is reserved with in the Sentencing Guidelines and reflected by the standards of appellate review adopt[ed]. Koon, Id.

Once before there were Guidelines, there was more innate wisdom in the sentencing of individual human beings. The fight was not a measuring of pints and an assessment of levels as the base line evaluation of a human being. We saw people for their frailties and their possibilities. After Booker, we have the ability restored to us to do this work of reclaiming the human self after criminal behavior. We also have the ability not to seek to find a way out of the mythical and ever growing and expanding heartland, but the opportunity to find the heart of a person, to weigh and make judgments which are laden with authenticity and not authority.

Before Probation became a force for imprisonment and not for rehabilitation, and since they make little difference in terms of their reports since Booker was decided, acting as if it is not for them really to play a role in all the 18 U.S.C. § 3553 (a) factors, it is left to the judge to find those worthy of redemption.

THE PROPOSED SENTENCE

We respectfully request that the Court reject the draconian recommendation of the PSR, but instead grant the departure to Criminal History Category IV and sentence the defendant to 33 months.

Respectfully yours,

_____
DAVID L. LEWIS

DLL/bf
cc: E. Danya Perry (via ECF and regular mail)
Assistant United States Attorney
Sara K. Anderson (via regular mail)
United States Probation Officer
Nathaniel Shyne